NOS. 15-3386/15-3387
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Mohammad S. Galaria,

Plaintiff-Appellant,

v.

Nationwide Mutual Insurance Company,

Defendant-Appellee.

Case No. 15-3386

Appeal from the United States District Court, Southern District of Ohio, Eastern Division (Case No. 2:13-cv-118)

Anthony Hancox,

Plaintiff-Appellant,

v.

Nationwide Mutual Insurance Company,

Defendant-Appellee.

Case No. 15-3387

Appeal from the United States District Court, Southern District of Ohio, Eastern Division (Case No. 2:13-cv-257)

CONSOLIDATED BRIEF OF DEFENDANT-APPELLEE NATIONWIDE MUTUAL INSURANCE COMPANY

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-3386 and 15-3387 Case Name: Galaria et al. v. Nationwide Mut. Ins. Co.

Name of counsel: Michael H. Carpenter, Michael N. Beekhuizen, David J. Barthel, Mark P. Szpak

Pursuant to 6th Cir. R. 26.1, Nationwide Mutual Insurance Company
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 22, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Michael H. Carpenter

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF REASONS WHY THE COURT SHOULD HEAR ORAL ARGUMENT

This case involves analysis of multiple claims and review of two District Court decisions. Accordingly, Defendant-Appellee Nationwide Mutual Insurance Company ("Nationwide") respectfully submits that oral argument will aid this Court in its consideration of this matter.

JURISDICTIONAL STATEMENT

The District Court had original jurisdiction over this matter pursuant to 28 U.S.C. § 1331 inasmuch as Plaintiffs asserted federal claims under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. The District Court also exercised supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1291 inasmuch as the District Court entered final judgment on February 14, 2014 and denied Plaintiffs' motion for reconsideration on March 11, 2015. Plaintiffs filed a notice of appeal on April 10, 2015.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly dismissed Plaintiffs' Complaints for lack of standing and failure to state a claim, where (a) Plaintiffs failed to allege any concrete, specific facts demonstrating any actual or certainly impending injury, and instead relied on speculation regarding the future actions of independent actors, namely, the cyber-criminals who attacked Nationwide's computer network,

and (b) Plaintiffs improperly attempted to base their Fair Credit Reporting Act ("FCRA") claim on FCRA's statement of purpose, and, in any event, failed to allege any facts regarding how Nationwide purportedly violated FCRA?

2. Whether the District Court properly denied Plaintiffs' motions to reconsider and for leave to amend, where (a) Plaintiffs failed to identify any reason for the District Court to reconsider its original decision and did not even request reconsideration or amendment except as to the claim for willful violation of FCRA, (b) Plaintiffs' proposed amended complaint still failed to allege any facts regarding how Nationwide purportedly violated FCRA, and (c) Plaintiffs failed to state a FCRA claim because Nationwide did not "furnish" personal information to anyone, rather, as alleged, that information was stolen by criminals?

3. Whether additional grounds, raised below by Nationwide but not reached by the District Court, support dismissal of Plaintiffs' Complaints, including (a) that Plaintiffs failed to allege any facts showing Nationwide is a "consumer reporting agency" as required to state a FCRA claim, (b) that Plaintiffs failed to allege any facts showing the existence of a "consumer report" as required to state a FCRA claim, (c) that Plaintiffs failed to allege willfulness or negligence as required to state a FCRA claim, and (d) that Plaintiffs failed to allege the various elements of their state law negligence and bailment claims?

STATEMENT OF THE CASE

Nationwide is an Ohio corporation in the business of providing various insurance products and services to consumers. Plaintiffs allege they either purchased insurance policies or received insurance quotes from Nationwide and that they provided personal information to Nationwide as part of those consumer transactions. Compl. ¶¶ 12–13, Doc. 1, PageID # 5–6.

On October 3, 2012, Nationwide was the victim of a criminal attack on a portion of its computer network. Plaintiffs allege that the criminal attack involved data relating to "an estimated 1.1 million customers and non-customers who had purchased insurance products from Nationwide or sought insurance quotations." Compl. ¶ 14, Doc. 1, PageID # 6. Plaintiffs allege Nationwide sent a letter to Plaintiffs and the affected consumers alerting them to the criminal attack, and offering "one year of free credit monitoring and identity theft protection through Equifax, which provides under certain conditions up to $1 million identity fraud expense coverage and access to his credit report." Compl. ¶ 17, Doc. 1, PageID # 6–7.

Plaintiffs do not allege they have suffered any actual injury from the alleged data theft. They do not allege they have suffered any out-of-pocket expenses. They do not allege they have incurred any fraudulent charges. They do not allege they have been the subject of identity theft. Instead, based on speculation about

what the cyber-criminals might do in the future, Plaintiffs allege it is possible they could incur injury in the future. Compl. ¶ 24, Doc. 1, PageID # 9. Plaintiffs allege that the possibility of such injury occurring in the future is actually less than 20 percent. *Id.*

Despite the fact that Plaintiffs have not suffered any harm from the intrusion, they nonetheless filed putative class action Complaints against Nationwide on January 28, 2013 and February 8, 2013, respectively.[1] In the Complaints, Plaintiffs assert five claims against Nationwide: (i) willful violation of FCRA (Count I); (ii) negligent violation of FCRA (Count II); (iii) negligence (Count III); (iv) invasion of privacy (Count IV); and (v) bailment (Count V). Plaintiffs purport to bring the claims on a class basis.

On April 19, 2013, Nationwide filed a motion to dismiss the Complaints. Nationwide Motion to Dismiss, Doc. 21, PageID # 95–136. Generally, Nationwide argued that Plaintiffs had failed to allege the "injury-in-fact" required to confer Article III standing, and that Plaintiffs had failed to sufficiently allege the various elements of their claims. *See* Nationwide Motion to Dismiss at 2, Doc. 21, PageID

[1] Plaintiffs' cases were consolidated in the District Court on March 22, 2013. *See* Mar. 22 Related Case Memorandum, Doc. 14, PageID # 72–73. All docket references to the District Court proceedings are to *Galaria*, Case No. 2:13-cv-118. No consolidated complaint was filed. The *Hancox* and *Galaria* complaints, however, are virtually identical and have the same paragraph numbering. This brief will cite to both complaints as "Complaints" or "Compl."

109 (summarizing arguments). Plaintiffs filed their opposition on May 20, 2013 (Doc. 26, PageID # 213–61) and Nationwide filed its reply on June 6, 2013 (Doc. 27, PageID # 262–89). Plaintiffs did not request leave to amend during the pendency of the motion to dismiss to either clarify the basis for their claims or to add any further factual allegations.

The District Court issued its Opinion & Order granting the motion to dismiss on February 10, 2014 (Doc. 40, PageID # 402–32). In a thorough, thirty-one page decision, the District Court held that Plaintiffs failed to allege any FCRA violation. In particular, the District Court held that Plaintiffs had improperly attempted to premise the alleged FCRA violation on FCRA's statement of purpose, and did "not have statutory standing to bring their FCRA claims" because they failed to allege any "injury arising from the violation of a particular statutory requirement or prohibition set forth in the FCRA." *Id.* at 9–10.

The District Court also held that Plaintiffs lacked standing to assert their negligence and bailment claims because they failed to allege any actual or certainly impending injury as required by *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013). Instead, contrary to *Clapper*, Plaintiffs' allegations of harm were impermissibly based on speculation about what actions independent actors (i.e., the data thieves) might take in the future. Feb. 10, 2014 Opinion & Order at 11–14, Doc. 40, PageID # 412–15.

With respect to the invasion of privacy claim, the District Court held Plaintiffs failed to allege Nationwide disseminated Plaintiffs' personal information. As the District Court stated, "the Complaint alleges the [personal information] was *stolen* from Defendant, not that Defendant disseminated it to anyone." Feb. 10, 2014 Opinion & Order at 29, Doc. 40, PageID # 430. Plaintiffs also failed to allege that their personal information had been publicized. *Id.* at 30, Doc. 40, PageID # 431. Accordingly, the District Court dismissed the invasion of privacy claim as well. *Id.* at 31, Doc. 40, PageID # 432.

Plaintiffs filed a motion for reconsideration and a memorandum in support of that motion on March 10, 2014 (Doc. 42–43, PageID # 434–46). Plaintiffs only sought reconsideration with respect to their claim for willful violation of FCRA. On the same date, Plaintiffs also filed a motion for leave to amend their Complaints (Doc. 44, PageID # 447–50). Consistent with the motion for reconsideration, Plaintiffs only sought leave to amend as to their claim for willful violation of FCRA. *See* Memorandum in Support of Motion for Leave to Amend at 5–8, Doc. 45, PageID # 455–58.

On March 11, 2015, the District Court issued an Opinion & Order denying the motion for reconsideration and the motion for leave to amend. *See* Mar. 11, 2015 Opinion & Order, Doc. 51, PageID # 535–44. The District Court held that Plaintiffs failed to identify any legal error warranting reconsideration, and further

held that the proposed amendment would be futile. *Id.* The District Court held amendment would be futile because Plaintiffs had failed to plead facts, rather than labels or conclusions, that would support their claim. *Id.* at 8–9, PageID # 542–43. Specifically, the District Court held "Named Plaintiffs' assertion that Defendant did not maintain reasonable procedures to limit the furnishings of consumer information is nothing more than a bare recitation of the elements of the claim . . . [a]s best as this Court can determine, the Amended Complaint *assumes* that the procedures were inadequate by the mere fact that customer information was stolen, but it does not plead any facts to support such an assumption." *Id.* at 9, PageID # 543 (emphasis in original).

The District Court further held that Plaintiffs failed to plead any facts to suggest that Nationwide had "furnished" consumer information as required for a FCRA claim. *Id.* at 9–10, PageID # 543–44. Rather, Plaintiffs "allege the information was stolen from Defendant." *Id.* Plaintiffs filed their Notice of Appeal on April 10, 2015. *See* Notice of Appeal, Doc. 52, PageID # 545–48.

Lastly, Nationwide notes there were several issues Plaintiffs raised in the District Court, that they did not address or argue in their appellate brief, which accordingly, Plaintiffs have now waived. Such issues are noted below where appropriate.

SUMMARY OF THE ARGUMENT

The criminal attack on Nationwide's computer network occurred on October 3, 2012, more than three years ago. Despite this passage of time, Plaintiffs have never alleged any injury to themselves. No out-of-pocket expenses. Or fraudulent charges. Or having had their identities stolen. Given the lack of actual injury, or any facts suggesting that injury is "certainly impending," Plaintiffs lack Article III standing to assert their claims.

"Standing is 'the threshold question in every federal case.'" *Coyne v. American Tobacco Company*, 183 F.3d 488, 494 (6th Cir. 1999). The "plaintiff bears the burden of demonstrating standing and must plead its components with specificity." *Id.* "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent[.]" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). With respect to "imminent" injury, the Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact' and '[a]llegations of *possible* future injury' are not sufficient." *Id.* at 1147. Standing cannot be based on "speculation about the 'unfettered choices made by independent actors not before the court.'" *Id.* at 1150 n.5.

Here, Plaintiffs do not allege they have suffered any actual injury. Instead, Plaintiffs argue that they are at "increased risk" of suffering some unknown injury

in the future as the result of the actions of independent actors, i.e., the cyber-criminals. As the District Court correctly held, this is exactly the type of speculation, that *Clapper* forbids. The District Court's conclusion on this point is supported by the overwhelming majority of courts that have concluded "increased risk" does not give rise to standing in the data breach context.

For example, in the leading case of *Reilly v. Ceridian Corp.*, the Third Circuit held that an increased risk of identity theft does not create a "certainly impending" injury sufficient for Article III standing to exist. *Reilly*, 664 F.3d 38 (3d Cir. 2011). Numerous courts around the country have reached the same conclusion. To the extent courts have held otherwise, such cases either involve specific allegations of actual injury (e.g., allegations that fraudulent charges were actually incurred) or the courts have engaged in improper speculation regarding future events—speculation which *Clapper* forbids.

Plaintiffs' Complaints also suffer another problem—they lack any facts identifying what Nationwide purportedly did to violate FCRA. As the District Court correctly held, Plaintiffs' Complaints failed to identify any specific provision of FCRA, that Nationwide allegedly violated. Instead, Plaintiffs improperly cited to, and relied upon, FCRA's statement of purpose—which does not impose obligations on anyone. *See* Compl. ¶¶ 50, 55, Doc. 1, PageID # 17, 19. While Paragraph 55 of the Complaints alleged that Nationwide failed "to adopt and

maintain . . . protective procedures," the District Court correctly held that this formulaic allegation was too "vague" and "fails to allege Defendant violated one of the requirements of" FCRA. *See* Feb. 10, 2014 Opinion & Order at 9, Doc. 40, PageID # 410.

The District Court also properly denied Plaintiffs' motion for leave to amend as futile. Plaintiffs' proposed Amended Complaint did nothing to correct the deficiencies previously identified by the District Court. Plaintiffs, for example, simply took former Paragraph 55, split it into two new paragraphs (Paragraphs 59 and 60) and slightly reworded them in a non-material manner. Not surprisingly, the District Court held that the proposed Amended Complaint still failed to allege facts regarding how Nationwide violated FCRA. *See* Mar. 11, 2015 Opinion & Order at 9, Doc. 51, PageID # 543.

Plaintiffs' proposed Amended Complaint was futile for another reason as well. In order to state a FCRA claim, Plaintiffs were required to allege that Nationwide "furnished" their personal information to a third party. Nationwide, however, did not "furnish" personal information to anyone. Instead, as alleged, the information was stolen. As the District Court and other courts addressing this issue have held, stolen data is not "furnished" for purposes of FCRA. *See* Mar. 11, 2015 Opinion & Order at 9–10, Doc. 51, PageID # 543–44 (citing cases).

Furthermore, the term "furnished" is used throughout FCRA—always in the

context of intentionally providing information as part of a commercial transaction or to a government agency. Nowhere is the term "furnish" used in a manner which suggests it was intended to apply in the context of a criminal theft of data. Attempting to shoehorn criminal data theft into a FCRA violation is not consistent with FCRA's intent or purpose, and indeed, would lead to absurd results.

Plaintiffs' proposed Amended Complaint also did nothing to address the problem of standing. The only new "fact" alleged in the proposed Amended Complaint was that, in January 2014, Plaintiff Galaria discovered three "attempts" to open credit cards in his name. Notably, however, Plaintiff Galaria did not allege any harm arising from these "attempts." He did not allege the "attempts" were successful, that any unauthorized or fraudulent credit card charges were actually made, or that these "attempts" proximately resulted from the October 3, 2012 criminal invasion of Nationwide, as opposed to the seemingly endless stream of criminal cyber attacks occurring every day in this country. This failure to allege any form of harm is particularly noteworthy given that the criminal attack on Nationwide's computer network occurred more than three years ago. Where similar amounts of time have passed without any actual injury, courts have held there is no "certainly impending" injury to support Article III standing. *See, e.g.*, *Fernandez v. Leidos, Inc.*, 2015 WL 5095893, at *7 (E.D. Cal. Aug. 28, 2015); *In re Zappos.Com, Inc.*, 2015 WL 3466943, at *8 (D. Nev. June 1, 2015).

This Court also may affirm "on any grounds, including grounds not relied upon by the district court." *Hensley Manufacturing, Inc. v. ProPride Inc.*, 579 F.3d 603, 609 (6th Cir. 2009). Here, Nationwide raised several issues in its motion to dismiss and in its opposition to Plaintiffs' motion for leave to amend, that the District Court did not address. For example, in order to state a FCRA claim, Plaintiffs were required to allege facts showing that Nationwide is a "consumer reporting agency," that the subject data was furnished as part of a "consumer report," and that the alleged violations were "willful" or "negligent." Aside from a few conclusory and formulaic recitations, Plaintiffs failed to plead any facts addressing these requirements.

Numerous courts have rejected similarly threadbare allegations. The Seventh Circuit, for example, rejected formulaic allegations that a healthcare network was a "consumer reporting agency" and that it prepared "consumer reports." *Tierney v. AdvocateHealth And Hospitals Corp.*, 797 F.3d 449 (7th Cir. 2015). In *Tierney*, as here, plaintiffs did not plead any facts, but instead relied on allegations which merely recited the statutory definitions.

Finally, Plaintiffs also failed to plead the elements of their state law negligence and bailment claims. This Court can and should affirm the District Court's decisions based on these additional grounds as well.

ARGUMENT

I. Applicable Legal Standards.

A. Standard Of Review.

This Court reviews de novo the District Court's dismissal of Plaintiffs' Complaints for lack of standing and for failure to state a claim. *Coyne v. American Tobacco Company*, 183 F.3d 488, 492 (6th Cir. 1999); *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516, 519 (6th Cir. 2008).

This Court reviews for abuse of discretion the denial of a motion for reconsideration. *Indah v. U.S. S.E.C.*, 661 F.3d 914, 924 (6th Cir. 2011). The denial of a motion for leave to amend on the grounds of futility is reviewed de novo. *Midkiff v. Adams Cnty. Reg'l Water Dist.*, 409 F.3d 758, 771 (6th Cir. 2005).

B. Fed. R. Civ. P. 12(b)(6) Standards.

Under Fed. R. Civ. P. 12(b)(6), "[c]onclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Bishop*, 520 F.3d at 519. "[A] complaint containing a statement of facts that merely creates a *suspicion* of a legally cognizable right of action is insufficient." *Id.* (emphasis in original). "The '[f]actual allegations must be enough to raise a right to relief above the speculative level'; they must 'state a claim that is plausible on its face.'" *Id.*

(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

In sum, after the Supreme Court's *Twombly* and *Iqbal* decisions, "a plaintiff cannot overcome a Rule 12(b)(6) motion to dismiss simply by referring to conclusory allegations in the complaint that the defendant violated the law." *16630 Southfield Limited Partnership v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013). "Instead, the sufficiency of a complaint turns on its 'factual content,' . . . requiring the plaintiff to plead enough 'factual matter' to raise a 'plausible' inference of wrongdoing." *Id.* (citations omitted). This requirement serves "a vital practical function: it prevents plaintiffs from launching a case into discovery—and from brandishing the threat of discovery during settlement negotiations—'when there is no reasonable likelihood that [they] can construct a claim from the events related in the complaint.'" *Id.* (quoting *Twombly*, 550 U.S. at 558) (alterations in original).

C. Relevant Provisions Of The Fair Credit Reporting Act.

FCRA is codified at 15 U.S.C. § 1681 *et seq.* Relevant provisions are summarized below, and set forth in Addendum B.

FCRA's intent and purpose is to ensure the "accuracy and fairness of credit reporting." *See* 15 U.S.C. § 1681(a). In their original Complaints, Plaintiffs based their FCRA claims on the following part of FCRA's statement of purpose:

> It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681(b).[2] The statement of purpose, however, does not impose any legal obligations under FCRA, and as the District Court held, Plaintiffs in their original Complaints did not point to any particular operative provision of FCRA that Nationwide purportedly violated.

In their proposed Amended Complaint, Plaintiffs sought to address that defect by citing the following FCRA provision:

> (a) IDENTITY AND PURPOSES OF CREDIT USERS
>
> Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable

[2] In order to avoid potential confusion, Nationwide notes that "§ 1681(b)" and "§ 1681b" are separate and distinct FCRA provisions.

> grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

15 U.S.C. § 1681e(a). In denying leave to amend, the District Court held that Plaintiffs nonetheless failed to allege facts regarding any Nationwide procedures or how it purportedly violated this statutory provision. *See* Mar. 11, 2015 Opinion & Order at 9, Doc. 51, PageID # 543. The District Court also held that Nationwide did not "furnish" any information within the meaning of that provision, given that Plaintiffs alleged it had been stolen. *Id.* at 9–10 (PageID # 543–44). The term "furnish" is not defined in FCRA, but is used throughout FCRA's statutory provisions.[3]

In addition, Nationwide further noted that, by its terms, the statute only applies to a "consumer reporting agency" and a "consumer report." A "consumer reporting agency" is defined as:

[3] *See, e.g.*, 15 U.S.C. § 1681b(a) ("any consumer reporting agency may furnish a consumer report under the following circumstances . . . ."); § 1681c(d)(1) ("Any consumer reporting agency that furnishes a consumer report that contains information regarding [a title 11 case] shall include in the report . . . ."); § 1681f ("a consumer reporting agency may furnish identifying information respecting any consumer . . . to a governmental agency"); § 1681h(a)(1) ("A consumer reporting agency shall require . . . that the consumer furnish proper identification"); § 1681k(a) ("A consumer reporting agency which furnishes a consumer report for employment purposes . . . ."); § 1681s-2(a)(1)(A) ("A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person know . . . the information is inaccurate"); § 1681v(a) ("a consumer reporting agency shall furnish a consumer report . . . to a government agency authorized to conduct investigations . . . .").

> any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers **for the purpose of furnishing consumer reports to third parties**, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f) (emphasis added). A "consumer report," in turn, is defined as a:

> written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness . . . which is used . . . for the purpose of . . . establishing the consumer's eligibility for–(A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under [15 U.S.C. § 1681b].

15 U.S.C. § 1681a(d)(1). As discussed in Section IV.A *infra*, Plaintiffs have failed to allege facts showing that either of these statutory definitions have been met here. Furthermore, attempting to shoehorn the underlying criminal cyber-attack into a violation of FCRA leads to absurd results, and is inconsistent with both the structure and intent of the statute.

II. The District Court Properly Dismissed Plaintiffs' Complaints.

It has been more than three years since the criminal attack on Nationwide's computer network, and more than two-and-a-half years since Plaintiffs filed their lawsuits. Despite this passage of time, Plaintiffs have never alleged any actual or certainly impending injury. Given the lack of any concrete, specific allegations of

injury, the District Court dismissed Plaintiffs' negligence and bailment claims for lack of Article III standing, and Plaintiffs' FCRA claims for lack of statutory standing. The District Court also dismissed Plaintiffs' invasion of privacy claim for failure to state a claim. The District Court's dismissal of Plaintiffs' Complaints should be affirmed.

A. Plaintiffs Lack Article III Standing To Assert Their Claims.

1. The District Court Applied The Correct Legal Standard For Standing.

"Standing is 'the threshold question in every federal case.'" *Coyne v. American Tobacco Company*, 183 F.3d 488, 494 (6th Cir. 1999) (citation omitted). The "plaintiff bears the burden of demonstrating standing and must plead its components with specificity." *Id.* "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

With respect to "imminent" injury, the Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact and [a]llegations of *possible* future injury are not sufficient." *Clapper*, 133 S. Ct. at 1147 (quotation marks omitted) (emphasis in original). The Supreme Court also noted that "[i]n some instances, we have found standing based on a 'substantial risk' that the harm will occur . . . ." *Id.* at 1150 n.5; *see also Susan B.*

Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014). The Court did not address whether this formulation is "distinct from the 'clearly impending' requirement," but stated that, nonetheless, "plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm." *Clapper* at 1150 n.5. Plaintiffs cannot satisfy this standard with "speculation about 'the unfettered choices made by independent actors not before the court.'" *Id.* (citation omitted).

The District Court in this case correctly identified these controlling legal standards. *See* Feb. 10, 2014 Opinion & Order at 6–7, 13 n.8, Doc. 40, PageID # 407–08, 414 (identifying and quoting standards set forth in *Clapper*). Plaintiffs' contention that the District Court somehow misread or misstated *Clapper* is simply wrong. To the contrary, it is Plaintiffs who misstate the applicable standards. Throughout their brief, Plaintiffs use phrases such as "significant," "real" or "increased" risk of harm. *See, e.g.*, Plaintiffs-Appellants' Brief at 13 ("significant" and "increased" risk of harm), 15 ("very real" risk), 16 ("significantly increased risk"). None of these formulations are consistent with *Clapper*. A "real" or "increased" risk of harm is not sufficient to create standing. Rather, Plaintiffs were required to plead "concrete" facts with specificity demonstrating a "certainly impending" injury. They did not do so.

2. Plaintiffs Failed To Allege With Specificity Any Concrete Facts Demonstrating A Certainly Impending Injury.

Plaintiffs' standing argument is premised on the assertion that they face an "increased risk" of identity theft. Plaintiffs do not allege that their identities have ever been stolen or that they have suffered any actual injury. Instead, Plaintiffs rely on speculation that such harm *might* occur in the future.

As the District Court noted, Plaintiffs' arguments are similar to those rejected by the Supreme Court in *Clapper*. *See* Feb. 10, 2014 Opinion & Order at 11, Doc. 40, PageID # 412. In *Clapper*, the plaintiffs sought a declaratory judgment that a provision of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1881a, permitting secret surveillance of and gathering of personal information about individuals who are not "United States persons" and who were reasonably believed to be located outside the United States, was unconstitutional. *Clapper*, 133 S. Ct. at 1142. The plaintiffs included various legal, labor, human rights and media organizations who claimed that people with whom they exchanged information were likely targets of surveillance under Section 1881a. *Id.* at 1145.

The *Clapper* plaintiffs claimed they were injured because (i) "their ability to locate witnesses, cultivate sources, obtain information, and communicate confidential information to their clients" had been compromised; (ii) they "ceased engaging in certain telephone and e-mail conversations"; (iii) "the threat of

surveillance will compel them to travel abroad in order to have in-person conversations"; and (iv) "they have undertaken 'costly and burdensome measures' to protect the confidentiality of sensitive communications." *Id.* at 1145–46. The Supreme Court held, however, that "respondents' theory of *future* injury was too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Id.* at 1143 (emphasis in original).

Plaintiffs here rely on similarly speculative arguments. As the District Court noted, Plaintiffs themselves allege that the risk of identity theft is less than 20 percent. *See* Feb. 10, 2014 Opinion & Order at 12–13, 13 n.8, Doc. 40, PageID # 413–14 ("An injury can hardly be said to be 'certainly impending' if there is less than a 20% chance of it occurring."). *Id.* This is particularly true given that three years have passed since the criminal attack on Nationwide's computer network, and Plaintiffs still have not suffered any actual injury.

Furthermore, Plaintiffs' entire argument is premised on the actions of independent actors—the criminals who illegally attacked Nationwide's computer network. Again, the District Court correctly pointed out that "whether Named Plaintiffs will become victims of theft or fraud or phishing is entirely contingent on what, if anything, the third party criminals do with that information." Feb. 10, 2014 Opinion & Order at 13, Doc. 40, PageID # 414. In *Clapper*, the Supreme Court stated that it was "reluctant to endorse standing theories that rest on

speculation about the decisions of independent actors." *Clapper*, 133 S. Ct. at 1141.

In sum, Plaintiffs were obligated to plead "concrete facts" with "specificity" demonstrating a certainly impending injury. They failed to do so. The District Court's decision should be affirmed.

3. The District Court's Decision Is Consistent With The Overwhelming Weight Of Authority In Data Breach Cases.

The District Court is not the first court to have considered whether an "increased risk of harm" in the data breach context is sufficient to give rise to Article III standing. The overwhelming weight of authority is consistent with the District Court's conclusion here.

In the leading case of *Reilly v. Ceridian Corp.*, for example, the Third Circuit held that an increased risk of identity theft did not create a "certainly impending" injury sufficient for Article III standing to exist. *Reilly*, 664 F.3d 38 (3d Cir. 2011). In *Reilly*, the defendant payroll processing firm was the subject of a criminal attack in which hackers illegally accessed the personal information of up to 27,000 persons. *Id.* at 40. Upon learning of the breach, the defendant sent letters to the affected persons informing them of the data breach and offering them one year of free credit monitoring. *Id.* Two of the affected persons then filed a class action complaint alleging they had an increased risk of identity theft, had

incurred costs to monitor their credit activity, and had suffered emotional distress. *Id.*

The Third Circuit began its analysis by noting that a plaintiff's complaint must "clearly and specifically set forth facts sufficient to satisfy Article III." *Id.* at 41. (citation omitted). "Allegations of 'possible future injury' are not sufficient . . . Instead, [a] threatened injury must be 'certainly impending[.]" *Id.* at 42. (citations omitted). Furthermore, a plaintiff "lacks standing if his 'injury' stems from an indefinite risk of future harms inflicted by unknown third parties." *Id*. Applying these principles, the Third Circuit held that the plaintiffs' allegations were too speculative to give rise to standing:

> We conclude that Appellants' allegations of hypothetical, future injury are insufficient to establish standing. Appellants' contentions rely on speculation that the hacker: (1) read, copied, and understood their personal information; (2) intends to commit future criminal acts by misusing the information; and (3) is able to use such information to the detriment of Appellants by making unauthorized transactions in Appellants' names. Unless and until these conjectures come true, Appellants have not suffered any injury; there has been no misuse of the information, and thus, no harm.

Id. at 42.[4]

[4] Although *Reilly* was decided before *Clapper*, the Third Circuit applied the same "certainly impending" standard used by the Supreme Court in *Clapper*. In the data breach context, courts have noted that, consistent with *Reilly*, the *Clapper* decision "compels the conclusion that [Plaintiff] lacks standing to bring her federal claims to the extent they are premised on the heightened risk of future identity

Like the Third Circuit in *Reilly*, numerous courts around the country have held a plaintiff does not have Article III standing merely because of an alleged increased risk of harm from exposure of the plaintiff's personal information.[5]

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theft/fraud." *See, e.g.*, *Peters v. St. Joseph Services Corp.*, 74 F. Supp. 3d 847, 856 (S.D. Tex. 2015) (following *Reilly* and discussing *Clapper*'s impact on any previous split of authority in data breach cases).

[5] *See, e.g.*, *Fernandez v. Leidos, Inc.*, No. 2:14-CV-02247-GEB, 2015 WL 5095893, at *7 (E.D. Cal. Aug. 28, 2015) ("Plaintiff has not shown there is a substantial risk that his [personal identifiable information] will be imminently misused in light of the attenuated chain of inferences necessary to find harm."); *In re Zappos.com, Inc., Customer Data Security Breach Litigation*, Case No. 3:12-cv-325, MDL No. 2357, 2015 WL 3466943, at *6 (D. Nev. June 1, 2015) ("it is not enough that a plaintiff face a credible threat of harm if that harm is not real, i.e. concrete, and immediate, i.e. certainly impending."); *In re Horizon Healthcare Services Inc. Data Breach*, Case No. 13-7418, 2015 WL 1472483, at *6 (D.N.J. Mar. 31, 2015) ("Plaintiffs' future injuries stem from the conjectural conduct of a third party bandit and are therefore inadequate to confer standing."); *Peters v. St. Joseph Services Corp.*, 74 F. Supp. 3d 847, 854 (S.D. Tex. 2015) ("[Plaintiff's] alleged future injuries are speculative—even hypothetical—but certainly not imminent."); *Lewert v. P.F. Chang's China Bistro, Inc.*, No. 13-cv-4787, 2014 WL 7005097, at *3 (N.D. Ill. Dec. 10, 2014) ("Speculation of future harm does not constitute actual injury."); *Strautins v. Trustwave Holdings, Inc.*, 27 F. Supp. 3d 871, 875 (N.D. Ill. Mar. 12, 2014) ("to the extent that [Plaintiff's claims] are premised on the mere possibility that her [personal identifiable information] was stolen and compromised, and a concomitant increase in the risk that she will become a victim of identity theft, [Plaintiff's] claim is too speculative to confer Article III standing."); *In re Barnes & Noble Pin Pad Litig.*, No. 12-cv-8617, 2013 WL 4759588, at *5 (N.D. Ill. Sept. 3, 2013) ("[I]ncreased risk of identity theft is insufficient to convey standing upon Plaintiffs."); *Brit Ins. Holdings N.V. v. Krantz*, No. 1:11 CV 948, 2012 WL 28342, at *9 (N.D. Ohio Jan. 5, 2012) ("an argument that the time and money spent monitoring a plaintiff's credit suffices to establish an injury overlooks the fact that their expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury that has not materialized."); *Kendel v. Local 17-A United Food & Commercial Workers*, 835 F. Supp. 2d 421, 437 (N.D. Ohio 2011) (counterclaimant's alleged

To the extent courts have held otherwise, the plaintiffs in those cases claimed to have incurred actual later charges or costs, or the courts have engaged in the type of speculation which *Clapper* forbids. The cases cited by Plaintiffs are typical in this regard. Plaintiffs, for example, rely primarily on *Remijas v. Neiman Marcus Group LLC*, 794 F.3d 688 (7th Cir. 2015), a data breach case involving the Neiman Marcus department store. That case, however, is factually inapposite. Unlike here, one plaintiff expressly alleged that, as a result of the data breach, "fraudulent charges appeared on her debit card account" and that "she was the target of a scam through her cell phone." *Id.* at 691. A second plaintiff alleged that she suffered "fraudulent charges on her credit card after she used it at Neiman

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injury "was not the result of any present injury, but rather the anticipation of future injury that has not materialized"); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060(RMB)(RLE), 2010 WL 2643307, at *2 (S.D.N.Y. June 25, 2010) ("[T]his Court concludes that Plaintiffs here do not have Article III standing . . . because they claim to have suffered little more than an increased risk of future harm from the loss (whether by accident or theft) of their personal information."); *Allison v. Aetna, Inc.*, No. 09-2560, 2010 WL 3719243, at *5 (E.D. Pa. Mar. 9, 2010) ("Plaintiff's alleged injury of an increased risk of identity theft is far too speculative."); *Amburgy v. Express Scripts, Inc*., 671 F. Supp. 2d 1046, 1053 (E.D. Mo. 2009) ("plaintiff's asserted claim of "increased-risk-of-harm" fail[ed] to meet the constitutional requirement that a plaintiff demonstrate harm that is "actual or imminent, not conjectural or hypothetical."); *Hinton v. Heartland Payment Sys., Inc*., No. 09-594 (MLC), 2009 WL 704139, at *1 (D.N.J. Mar. 16, 2009) (Plaintiff's "allegations of injuries amount to nothing more than mere speculation."); *Key v. DSW Inc.*, 454 F. Supp. 2d 684, 690 (S.D. Ohio 2006) ("Plaintiff's claims are based on nothing more than a speculation that she will be a victim of wrongdoing at some unidentified point in the indefinite future . . . this Court is precluded from finding that she has standing under Article III.").

Marcus in 2013." *Id.* And, the complaint alleged that 9,200 other customers also incurred fraudulent charges. *Id.* at 692. While these customers were reimbursed for the fraudulent charges, they purportedly were harmed by having to "reset payment associations after credit card numbers [were] changed, and to pursue relief for unauthorized charges." *Id.* The court found that these later-occurring circumstances were sufficient to confer Article III standing. *Id.* at 696.

Plaintiffs Galaria and Hancox, in contrast, have not alleged that they have incurred any such purportedly related "harm": Plaintiffs do not allege that they have incurred any fraudulent charges. Plaintiffs do not allege that they have had to expend time or money pursuing relief for unauthorized charges. *Neiman Marcus* is simply inapposite in that important respect.

Neiman Marcus is also inapposite because it applied the wrong legal standard. Specifically, in *Neiman Marcus*, the Seventh Circuit cited *Clapper* for the proposition that an "objectively reasonable likelihood" of injury is sufficient to confer standing:

> [T]he Neiman Marcus customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such an injury will occur. *Clapper*, 133 S. Ct. at 1147.

Neiman Marcus, 794 F.3d at 693. Yet, on page 1147 of the *Clapper* decision, the Supreme Court *expressly rejected* this "objectively reasonable" standard:

> Respondents assert that they can establish injury in fact that is fairly traceable to § 1881a because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under § 1881a at some point in the future. This argument fails. As an initial matter, the Second Circuit's "objectively reasonable likelihood" standard is inconsistent with our requirement that "threatened injury must be certainly impending to constitute injury in fact."

Clapper, 133 S. Ct. at 1147. The Seventh Circuit's reliance on an "objectively reasonable" standard—and its citation to *Clapper* to support that standing—is incorrect. This Court should not follow a case that has misstated controlling Supreme Court precedent.

The Seventh Circuit also engaged in the very sort of speculation that *Clapper* forbids. Pondering the motives of the criminal hackers, the Seventh Circuit reasoned it was "plausible to infer" a "substantial risk" of harm existed because "Why else would hackers break into a store's database and steal consumers' private information? Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities." *Neiman Marcus*, 794 F.3d at 693. The problem with the Seventh Circuit's reasoning is that it assumes every single consumer exposed to a data breach will, in fact, have his or her identity stolen "sooner or later," even when the data breach involves hundreds of thousands or even millions of consumers.

Plaintiffs' own allegations in this case contradict such speculation. Plaintiffs themselves only allege that less than 20 percent of consumers exposed to a data breach will experience some form of identity theft. *See* Feb. 10, 2014 Opinion & Order at 13 n. 8, Doc. 40, PageID # 414 n.8. And Plaintiffs—despite the passage of three years since the criminal attack on Nationwide's computer network—have failed to allege any actual harm to themselves. In *Clapper*, the Supreme Court warned that a "speculative" or "highly attenuated chain of possibilities" does not establish a "certainly impending" injury. *Clapper*, 133 S. Ct. at 1148, 1150. It also made clear that standing cannot be based on "speculation about 'the unfettered choices made by independent actors not before the court.'" *Id.* at 1150 n.5. (citation omitted). The Seventh Circuit's *Neiman Marcus* decision is inconsistent with *Clapper* and should not be followed.

Finally, the Seventh Circuit also improperly penalized Neiman Marcus for offering free credit monitoring services to its potentially affected customers:

> It is telling . . . that Neiman Marcus offered one year of credit monitoring and identity-theft protection to all customers . . . who had shopped at their stores between January 2013 and January 2014. It is unlikely that it did so because the risk is so ephemeral that it can be safely disregarded . . . .

Neiman Marcus, 297 F.3d at 694. This is highly problematic from a policy standpoint because it disincentivizes companies from proactively taking steps to address a criminal cyber attack. It is also an improper consideration as to whether

federal subject matter jurisdiction has been established. *See*, *e.g.*, *Clapper*, 133 S. Ct. at 1143. In *Clapper*, the U.S. Supreme Court explained that plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Id.* If plaintiffs cannot manufacture standing by making expenditures based on non-imminent future harm, then it follows that *defendants'* own expenditures likewise cannot give rise to standing.[6]

The District Court here identified and correctly applied the controlling legal principles set forth in *Clapper*, consistent with the overwhelming majority of courts to consider the same issues. Accordingly, the District Court's dismissal of Plaintiffs' claims for lack of standing should be affirmed.

4. Plaintiffs Have Waived Any Argument Regarding Loss Of Privacy, Deprivation Of Value, Or Cost Of Mitigation.

In the court below, Plaintiffs also argued standing based on a purported loss of privacy, deprivation of the value of their personal information, and cost of mitigation. *See* Feb. 10, 2014 Opinion & Order at 18, 21–22, Doc. 40, PageID # 419, 422–23. On appeal, Plaintiffs do not present any argument regarding loss of

[6] The other case Plaintiffs rely on—*In re Adobe Systems, Inc. Privacy Litigation*, 66 F. Supp. 3d 1197 (N.D. Cal. 2014)—is similarly unpersuasive. Like the Seventh Circuit, the *Adobe* court improperly speculated that every person whose personal information is exposed in a data breach will suffer some form of injury. *See Adobe*, 66 F. Supp. 3d at 1216. Again, this is exactly the type of speculation—speculation regarding the actions of independent actors—that *Clapper* forbids.

privacy or deprivation in value, and accordingly, have waived these issues. *United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) ("[A]n appellant abandons all issues not raised and argued in its initial brief on appeal.").

Likewise, while Plaintiffs' appellate brief includes a passing mention of the purported cost of rectifying identity theft, Plaintiffs fail to present any argument on this point. Accordingly, Plaintiffs have waived this issue as well. *Johnson*, 440 F.3d at 845–46 ("[I]t is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (internal quotation marks and citations omitted).[7]

[7] Even if Plaintiffs have preserved this argument—and they have not—it still fails. Plaintiffs have not pled any concrete, specific facts indicating that they have incurred any mitigation costs. And, in any event, plaintiffs "cannot manufacture Article III standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 133 S. Ct. at 1151. In the identity theft context, courts similarly have routinely rejected the premise that spending money on preventive measures is a cognizable harm or injury. *See, e.g.*, *In re Zappos.com, Inc.*, 2015 WL 3466943, at *7 (D. Nev. June 1, 2015) ("[C]osts incurred to prevent future harm is not enough to confer standing . . . 'even when such efforts are sensible.'"); *Kahle v. Litton Loan Serv. LP*, 486 F. Supp. 2d 705, 711 (S.D. Ohio 2007) (courts "reject the theory that a plaintiff is entitled to reimbursement for credit monitoring services or for time and money spent monitoring [the plaintiff's] credit"); *Giordano v. Wachovia Secs, LLC.*, Civ. No. 06-476 (JBS), 2006 WL 2177036, at *4 (D.N.J. July 31, 2006) ("[A]llegations that . . . [the plaintiff] will incur costs associated with obtaining credit monitoring services in order to prevent identity theft simply does not rise to the level of creating a concrete and particularized injury."); *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006) ("expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury that has not materialized."). This conclusion is particularly appropriate here, because

B. Plaintiffs Lack Statutory Standing And Failed To State A Claim For Violation Of FCRA.

In its motion to dismiss, Nationwide argued that Plaintiffs failed to state FCRA claims because Plaintiffs improperly based those claims on an alleged violation of FCRA's statement of purpose, and Plaintiffs' FCRA allegations were vague and conclusory. Nationwide Motion to Dismiss at 14, Doc. 21, PageID # 121. The District Court agreed, but also analyzed Plaintiffs' claim for willful violation of FCRA as a question of statutory standing. *See* Feb. 10, 2014 Opinion & Order at 7, Doc. 40, PageID # 408. Regardless whether Plaintiffs' claims are analyzed as an issue of statutory standing, or for failure to state a claim, the District Court's conclusion is correct and should be affirmed.

In their Complaint, Plaintiffs failed to identify any specific FCRA provision Nationwide purportedly violated. Instead, Plaintiffs only cited to 15 U.S.C. § 1681(b). *See* Complaint ¶ 50, Doc. 1, PageID # 17. Section 1681(b), however, is FCRA's statement of purpose. There is no cause of action for violation of Section 1681(b)—a legal point Plaintiffs do not dispute. As the District Court correctly held, Plaintiffs' reliance on § 1681(b) was not inadvertent, and accordingly, Plaintiffs lacked statutory standing to assert a FCRA claim. *See* Feb. 10, 2014 Opinion & Order at 9 n.5, Doc. 40, PageID # 410 ("To hold otherwise would

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Nationwide already has offered Plaintiffs free credit reporting and a $1 million identity theft protection and insurance product. *See* Compl. ¶ 17, PageID # 6–7.

confer statutory standing on any plaintiff who alleges a defendant violated the purpose of a statute regardless of whether the defendant took or failed to take an action the statute prohibited or required.").

More importantly, Plaintiffs' factual allegations were insufficient to state a claim. As the District Court held, Plaintiffs failed to allege any facts showing "a specific requirement in the FCRA that Defendant failed to perform or a specific prohibition that Defendant ignored." Feb. 10, 2014 Opinion & Order at 9, Doc. 40, PageID # 410. The District Court also held that Plaintiffs' allegations were too "vague" and "insufficient . . . to allege Defendant violated one of the requirements of the subchapter." *Id.*

In reaching this conclusion, the Court specifically referred to Paragraph 55 of the Complaint, which Plaintiffs cited as providing the factual basis for their FCRA claim. That paragraph provides:

> As a Consumer Reporting Agency, Defendant was (and continues to be) required to adopt and maintain procedures designed to protect and limit the dissemination of consumer credit, personnel, insurance and other information in a manner fair and equitable to consumers while maintaining the confidentiality, accuracy, relevancy, and proper utilization of such information. Defendant, however, violated FCRA by failing to adopt and maintain such protective procedures which, in turn, directly and/or proximately resulted in the theft and wrongful dissemination of Plaintiff's and the other Class Members' PII into the public domain.

Complaint ¶ 55, Doc. 1, PageID # 19. This is the only paragraph in Plaintiffs' twenty-five page Complaint that purports to describe how Nationwide violated FCRA.

The Court's interpretation of Plaintiffs' allegations is correct. Conclusory and "formulaic recitations" of the elements of a cause of action are not sufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Tierney v. AdvocateHealth And Hospitals Corp.*, 797 F.3d 449, 451–54 (7th Cir. 2015) (formulaic allegations insufficient to state a claim under FCRA); *Willey v. J.P. Morgan Chase, N.A.*, No. 09 Civ. 1397 (CM), 2009 WL 1938987, at *2–4 (S.D.N.Y. Jul. 7, 2009) (same); *Shostack v. Diller*, 2015 WL 5535808, at *10 (S.D.N.Y. Sept. 16, 2015) (same). Paragraph 55 is nothing more than an improper conclusory and formulaic allegation lacking any factual support. The District Court's decision should be affirmed.

C. Plaintiffs Failed To State A Claim For Invasion Of Privacy.

The District Court also dismissed Plaintiffs' state law invasion of privacy claim for failure to state a claim. Feb. 10, 2014 Opinion & Order at 27, Doc. 40, PageID # 428. Specifically, the District Court held that Plaintiffs failed to allege Nationwide disseminated Plaintiffs' personal information, or that Plaintiffs' personal information was publicized. *Id.* at 28–31, Doc. 40, PageID # 429–32.

In their appellate brief, Plaintiffs do not address the District Court's dismissal of this claim. Accordingly, Plaintiffs have waived this issue. *United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) ("[A]n appellant abandons all issues not raised and argued in its initial brief on appeal.").

III. The District Court Properly Denied Plaintiffs' Motion For Leave To Amend.

A motion for leave to amend may only be granted if the District Court's final judgment is first set aside. *In re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 624 (6th Cir. 2008); *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002). Consistent with this authority, the District Court denied Plaintiffs' motion for leave to amend because Plaintiffs failed to identify any reason to set aside the final judgment. Mar. 11, 2015 Opinion & Order at 7, Doc. 51, PageID # 541.[8] To affirm the District Court's denial of the motion to amend, accordingly, the Court need go no further.

The District Court, however, also denied Plaintiffs' motion for leave to amend on the additional, independent ground that the proposed Amended Complaint was futile. Mar. 11, 2015 Opinion & Order at 7, Doc. 51, PageID # 541. Specifically, the District Court held that Plaintiffs' proposed Amended

[8] Plaintiffs filed separately a motion for reconsideration and a motion for leave to amend. Although Plaintiffs mention the motion for reconsideration in their appellate brief, they do not argue expressly that the District Court's denial of that motion was improper. Accordingly, Plaintiffs have waived this issue as well.

Complaint still failed to allege how Nationwide violated FCRA, and that Nationwide did not "furnish" Plaintiffs' information to anyone, as required to state a FCRA claim. Instead, as alleged, that information was stolen. *Id.* at 9, PageID # 543. Both conclusions are correct.

A. The Proposed Amended Complaint Still Failed To Allege Any Facts Demonstrating How Nationwide Purportedly Violated FCRA.

In dismissing the original Complaints, the District Court held Plaintiffs failed to allege how Nationwide violated FCRA. *See* Section II.B, *supra*. Plaintiffs' proposed Amended Complaint did nothing to correct this deficiency. Plaintiffs simply took former Paragraph 55, split it into two new paragraphs, slightly reworded it in a non-material manner, and inserted references to Sections 1681b and 1681e. *See* Proposed Amended Complaint ¶¶ 59, 60 (Doc. 45-1, PageID # 480–81).

These "new" Paragraphs do not contain any new factual detail, and still fail to explain how Nationwide purportedly violated Section 1681e. In short, new Paragraphs 59 and 60 are essentially the same as original Paragraph 55—nothing more than vague, conclusory and formulaic recitations of the elements of Plaintiffs' claim. Not surprisingly, the District Court held Plaintiffs' proposed Amended Complaint still failed to allege facts regarding how Nationwide violated FCRA. Mar. 11, 2015 Opinion & Order at 9, Doc. 51, PageID # 543 ("Named

Plaintiffs' assertion that Defendant did not maintain reasonable procedures to limit the furnishing of consumer information is nothing more than a bare recitation of the elements of the claim.").

In their appellate brief, Plaintiffs have no response to this holding, other than to suggest that it is "unreasonable and draconian" to require Plaintiffs to plead facts before discovery commences. Plaintiffs, however, are not entitled to a fishing expedition. *Sharp v. Calkins*, 114 F.3d 1188 (Table), 1997 WL 249952 (6th Cir. 1997) (plaintiff's "vague assertions that he needs 'key facts' to ascertain if he may file unspecified civil rights actions in the future are tantamount to a request for a court-sanctioned fishing expedition. This court has turned down such requests in the past."). Indeed, as this Court has recognized, the requirement that Plaintiffs plead facts in support of their claims serves "a vital practical function: it prevents plaintiffs from launching a case into discovery—and from brandishing the threat of discovery during settlement negotiations—'when there is no reasonable likelihood that [they] can construct a claim from the events related in the complaint.'" *16630 Southfield Limited Partnership v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013) (quoting *Twombly*, 550 U.S. at 558) (alterations in original).

In sum, Plaintiffs have failed to plead facts in support of their claim, and they cannot evade this requirement by complaining that they first need to conduct discovery. The District Court's denial of leave to amend should be affirmed.

B. Nationwide Did Not "Furnish" Information As Required By FCRA.

The District Court also held that Plaintiffs' proposed Amended Complaint was futile because Nationwide did not "furnish" any information within the meaning of FCRA. Instead, as alleged, that information was stolen. Mar. 11, 2015 Opinion & Order at 9–10, Doc. 51, PageID # 543–44. This conclusion is also correct and should be affirmed.

Section 1681e(a) prohibits a consumer reporting agency from "furnishing" a consumer report "to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b[.]" Plaintiffs expressly allege that Nationwide violated this provision because Nationwide "furnished Plaintiffs' PII [personal information] to data thieves by giving data thieves access to the PII." Proposed Amended Complaint ¶ 60 (Doc. 45-1, PageID # 481).

Nationwide, however, did not "furnish" information within the meaning of FCRA. Instead, as Plaintiffs repeatedly allege, their personal information was *stolen from* Nationwide by criminals. Not surprisingly, the District Court held Plaintiffs failed to allege Nationwide "furnished" their personal information to anyone:

> The Amended Complaint likewise fails to state a claim as to the assertion that Defendant furnished Plaintiffs' PII to data thieves. Although the FCRA does not define the

> term "furnish," this term requires an affirmative act on the part of the consumer reporting agency. *See Willingham v. Global Payments, Inc.*, No. 1:12-CV-1157, RWS, 2013 WL 440702, at *13 (N.D. Ga. Feb. 5, 2013) (citing *Holmes v. Countrywide Fin. Corp.*, No. 5:08-CV-205-R, 2012 WL 2873892, at *16 (W.D. Ky. July 12, 2012)). Named Plaintiffs do not plead any facts to suggest that Defendant made an affirmative act to 'furnish' the consumer information. Rather, they allege the information was stolen from Defendant. When consumer information is *stolen* from a consumer reporting agency, "[n]o coherent understanding of the words, 'furnished' or 'transmitted' would implicate [the consumer reporting agency]'s action under the FCRA." *Holmes*, 2012 WL 2873892, at *16; *see also Willingham*, 2013 WL 440702, at *13 ("the relevant fact is that the data was stolen, not furnished"). Thus, the Amended Complaint fails to state a claim under the second prong of § 1681e(a).

Mar. 11, 2015 Opinion & Order at 9–10, Doc. 51, PageID # 543–44.[9]

Plaintiffs do not have any coherent response on this issue. Plaintiffs say that "furnishing" is meant to "modify" the phrase "reasonable procedures." They also argue that the Federal Trade Commission has provided an interpretation of what "reasonable procedures" means. *See* Plaintiff-Appellants' Brief at 26. But nowhere do the Plaintiffs offer any definition of "furnish" that is different than the

[9] The District Court's conclusion is supported by other cases as well. *See Dightman v. Tex. Dept. of Pub. Safety*, No. A-10-CA-776-SS, 2010 WL 4922646, at *4 (W.D. Tex. Nov. 29, 2010); *Alam v. Sky Recovery Servs., Ltd.*, No. H-08-2377, 2009 WL 693170, at *4 (S.D. Tex. Mar. 13, 2009); *Thomasson v. Bank One, La., N.A.*, 137 F. Supp. 2d 721, 722 (E.D. La. 2001).

definition provided by the District Court. There simply is no contrary legal authority.

Should any doubt remain, the structure and context of FCRA confirm that "furnish" does not apply to a criminal cyber attack. Although the term "furnish" is not defined in FCRA, it is used in several FCRA statutory provisions. The use of "furnish" in these provisions is clearly in the context of a "consumer reporting agency" intentionally providing a "consumer report" either to a third person as part of a commercial transaction or to a governmental agency. *See* Section I.C at n.3, *infra* (listing relevant FCRA provisions). Nowhere is "furnished" used in a context that would suggest it was intended to apply to criminal hackers who are alleged to have stolen data. This Court must construe "furnish" consistent with its use throughout FCRA, and not in the idiosyncratic manner preferred by Plaintiffs. *See Morrison v. Colley*, 467 F.3d 503, 509 (6th Cir. 2006) (explaining that "typically identical words used in different parts of the same act are intended to have the same meaning.") (citations omitted).

This Court also cannot interpret FCRA in a manner that leads to absurd results. *Gillie v. Law Office of Eric A. Jones, LLC*, 785 F.3d 1091, 1100 (6th Cir. 2015). Yet, Plaintiffs' interpretation of FCRA—shoehorning a claim of criminal data theft into the "furnishing" of a "consumer report"— would do just that. If Nationwide is a "consumer reporting agency," which it is not, and if the criminal

attack on Nationwide's computer network involved the "furnishing" of a "consumer report," then under FCRA:

- Nationwide was obligated to disclose to the cyber-criminals information regarding any Title 11 cases involving the affected consumers. *See* 15 U.S.C. § 1681c(d)(1) ("Any consumer reporting agency that furnishes a consumer report that contains information regarding any case . . . under title 11 shall include in the report an identification of the chapter of such title 11 under which such case arises . . . .");

- Nationwide was obligated to tell the cyber-criminals whether the number of credit inquiries affected the consumers' credit scores. *See* 15 U.S.C. § 1681c(d)(2) ("Any consumer reporting agency that furnishes a consumer report that contains any credit score . . . shall include in the report . . . that a key factor . . . was the number of enquiries[.]"); and

- Nationwide was obligated to give the cyber-criminals a notice regarding the cyber-criminals' obligations under FCRA as users of the consumer reports. *See* 15 U.S.C. § 1681e(d)(1)(B) ("A consumer reporting agency shall provide to any person . . . to whom a consumer report is provided . . . a notice of such person's responsibilities under this subchapter.").

These absurd results are not idle speculation. Plaintiffs' own allegations reflect the odd results that would occur under their interpretation of FCRA. Plaintiffs allege, for example, that "Defendant flagrantly disregarded . . . Plaintiff's . . . rights . . . by not obtaining Plaintiff's . . . prior written consent . . . to disclose their [personal information] to any other person—as required by FCRA[.]" Compl. ¶ 29, Doc. 1, PageID # 11. Under this theory, Nationwide violated FCRA by not obtaining Plaintiffs' written consent to have their data stolen by cyber-criminals.

Plaintiffs' reading of FCRA cannot be squared with the plain language of FCRA's statutory provisions, let alone its purpose and intent.

These are but a few of the absurd results which occur if criminal cyber-hacking is considered to involve the "furnishing" of a "consumer report" as Plaintiffs assert. Plaintiffs' efforts to shoehorn the criminal attack on Nationwide's computer network into a FCRA violation should be rejected, and the District Court's interpretation of "furnish" should be affirmed.

C. Plaintiffs' Proposed Amended Complaint Did Not Contain Any New Allegations Giving Rise To Standing.

Plaintiffs also contend their proposed Amended Complaint includes additional facts giving rise to standing. It does not. The only new "fact" alleged is that "[o]n or around January 17, 2014, Plaintiff Galaria checked his credit report and discovered three recent unauthorized attempts to open credit cards in his name." *See* Proposed Amended Complaint ¶ 21, Doc. 45-1, PageID # 468–69. Significantly, Plaintiffs made no argument below that the new allegation required any reconsideration of the District Court's prior rulings, and accordingly they should not be allowed to make that argument now for the first time on appeal.[10]

[10] As noted by the District Court: "Named Plaintiffs suggest only that these facts show there has been no undue delay in bringing this amendment. Notably, they do not argue these new facts affect the Court's prior analysis. The Court would only consider arguments for undue delay if Plaintiffs stated a claim." *See* Mar. 11, 2015 Opinion & Order at 7 n.4, Doc. 51, PageID # 541 n.4.

Even if considered, however, Plaintiffs do not allege any harm arising from these "attempts." They do not allege the "attempts" were successful. They do not allege any unauthorized or fraudulent credit card charges were actually made. They do not allege Plaintiff Galaria suffered any actual injury or out-of-pocket expenses. They do not even allege Plaintiff Galaria expended anything other than a de minimis amount of time reviewing his credit report. Plaintiffs also fail to allege that their purported injuries were proximately caused by the October 3, 2012 data breach.[11] And there are no new allegations regarding Plaintiff Hancox whatsoever.

This failure to allege any form of harm is particularly remarkable given that the criminal attack on Nationwide's computer network occurred more than three years ago. Because there is no actual or "certainly impending" injury, this Court should affirm the District Court's dismissal of Plaintiffs' claims for lack of standing. *See, e.g.*, *Fernandez v. Leidos, Inc.*, 2015 WL 5095893, at *7 (E.D. Cal. Aug. 28, 2015) (dismissing various claims for lack of Article III standing; "in light of the fact . . . that now almost four years has elapsed since the Data Breach, Plaintiff has not shown that any alleged risk of future identity theft . . . is imminent"); *In re Zappos.Com, Inc.*, 2015 WL 3466943, at *8 (D. Nev. June 1,

[11] In similar cases, courts have recognized that Plaintiffs must allege their injuries were proximately caused by the particular data breach at issue. *See In re Zappos.com, Inc.*, 2015 WL 3466943, at *9 (D. Nev. June 1, 2015) ("Since today so much of our personal information is stored on servers just like the ones that were hacked in this case, it is not unrealistic to wonder whether Plaintiffs' hypothetical future harm could be traced to Zappos's breach.").

2015) ("[T]here must be a point at which a future threat can no longer be considered certainly impending or immediate despite its still being credible . . . The more time that passes without the alleged future harm actually occurring undermines any argument that the threat of that harm is immediate, impending, or otherwise substantial.").

In summary, Plaintiffs' proposed Amended Complaint was futile: Plaintiffs still did not allege facts regarding how Nationwide violated FCRA, and Plaintiffs still did not allege any concrete, specific facts demonstrating standing. Furthermore, as the District Court correctly held, Nationwide did not "furnish" information to the criminal data thieves. The District Court's denial of leave to amend should be affirmed.

D. Plaintiffs Only Sought Reconsideration And Leave To Amend As To Their Claim For Willful Violation Of FCRA.

Lastly, Plaintiffs argue the District Court abused its discretion by denying leave to amend without discussing Plaintiffs' state law claims:

> In fact, the Order does not even mention Plaintiffs' claims for negligence, invasion of privacy, and bailment, instead focusing solely on Plaintiffs' FRCA [sic] claims. Such glaring omissions make clear that the district court abused its discretion in denying the motion for leave to amend.

Appellants' Brief at 24–25. This argument is remarkable given that Plaintiffs moved for reconsideration, and sought leave to amend, *only* with respect to their

claim for a willful violation of FCRA. *See* Motion for Reconsideration at 1–2, Doc. 42, PageID # 434–35; Motion for Leave to Amend at 1, Doc. 44, PageID # 447. They did *not* move for reconsideration, or seek leave to amend, with respect to any of their remaining claims.

The District Court hardly can be faulted for failing to mention claims Plaintiffs *expressly excluded* from their motions. Plaintiffs' argument on this point obviously fails. It does highlight, however, the lack of merit in Plaintiffs' approach to this case.[12]

IV. Additional Grounds Supporting Affirmance Of The District Court's Decisions.

In its briefing below, Nationwide also raised several additional grounds for dismissal of the original Complaints and in opposition to the proposed Amended Complaint, which the District Court did not reach in either of its decisions. This Court can and should affirm on these grounds as well. *Hensley Manufacturing, Inc. v. ProPride Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (this Court may affirm "on

[12] In a similar vein, Plaintiffs argue the District Court did not address the allegations in the proposed amended complaint regarding the "attempts" to open credit cards in Plaintiff Galaria's name. Plaintiff-Appellants' Brief at 24. This once again is not true. The District Court explicitly addressed these allegations on page 7 of its March 11, 2015 Opinion & Order. *See* Doc. 51, PageID # 541 ("Named Plaintiffs also seek to add facts suggesting that there have been recent attempts to open credit cards in a plaintiff's name[.]" And as noted above, the District Court expressly observed that the Plaintiffs *made no argument* "that these new facts affect the Court's prior analysis." *Id.* at 7 n.4 (PageID # 541).

any grounds, including grounds not relied upon by the district court"); *Lamer v. Metaldyne Co. LLC*, 240 F. App'x 22, 28–29 (6th Cir. 2007) (same).[13]

A. Plaintiffs Have Failed To Allege The Required Elements Of A FCRA Claim.

Nationwide is an insurance company and is heavily regulated under myriad federal and state statutes. But it is not a credit bureau or consumer reporting agency. Courts have routinely rejected attempts to apply FCRA to businesses, such as insurance companies and banks, which FCRA is not intended to regulate as consumer reporting agencies. Indeed, the leading case on this point involved some of the same counsel representing Plaintiffs here, and rejected the same boilerplate FCRA allegations made here. *See Tierney v. AdvocateHealth And Hospitals Corp.*, 797 F.3d 449, 451–52 (7th Cir. 2015). The *Tierney* case makes clear Plaintiffs' claims fail as a matter of law, as discussed below.

1. Nationwide Is Not A "Consumer Reporting Agency" Governed By FCRA.

FCRA defines "consumer reporting agency" as "any person which . . . regularly engages . . . in the practice of assembling or evaluating consumer credit

[13] The additional grounds supporting affirmance were raised below at: Nationwide Motion to Dismiss at 12–17, 17–22, 26–28 (Doc. 21, PageID # 119–24, 124–29, 133–35); Nationwide Reply in Support of Motion to Dismiss at 10–13, 13–17, 20 (Doc. 27, PageID # 277–80, 280–84, 287); and Nationwide Memorandum in Opposition to Plaintiffs' Motion for Leave to Amend at 9 (Doc. 47, PageID #509).

information . . . for the purpose of furnishing consumer reports to third parties[.]" 15 U.S.C. § 1681a(f). Plaintiffs do not plead any facts demonstrating that Nationwide meets this definition. Instead, Plaintiffs make the following formulaic allegation:

> Defendant is a Consumer Reporting Agency as defined under FCRA because on a cooperative nonprofit basis and/or for monetary fees, Defendant regularly engages, in whole or in part, in the practice of assembling Plaintiff's and the other Class Members' PII for the purpose of furnishing Consumer Reports to third parties in connection with providing insurance quotes and/or uses interstate commerce for the purpose of preparing and/or furnishing Consumer Reports in connection with providing insurance quotes.

Compl. ¶ 53, Doc. 1, PageID # 18.

This threadbare allegation and contorted interpretation of the statute is not sufficient under *Iqbal* or *Twombly*. The Seventh Circuit rejected an *identical* allegation that the defendant was a "consumer reporting agency" under FCRA:

> The complaint alleges that "Advocate is a Consumer Reporting Agency" because it "assembl[es] information on consumers" on a "cooperative nonprofit basis and/or for monetary fees" for the "purpose of furnishing Consumer Reports to third parties." But these are merely conclusory allegations—a "threadbare recital" of the statutory elements. *Adams*, 742 F.3d at 728. On their own, they are insufficient under *Twombly* and *Iqbal*.

Tierney v. AdvocateHealth And Hospitals Corp., 797 F.3d 449, 451–52 (7th Cir. 2015). Here, Plaintiffs' identical allegation is also a "threadbare recital of the statutory elements" and should be rejected for the same reason.

Furthermore, in *Tierney*, the Seventh Circuit held that the defendant health care network was not the type of business FCRA was intended to regulate:

> Advocate is, as the complaint acknowledges, a "network of affiliated doctors and hospitals that treat patients"—not a credit or consumer reporting company.

Tierney, 797 F.3d at 452. The fact that the defendant collected information about its own customers, and may have shared that information with third parties in order to "determine eligibility and pricing for health services and to set rates for a variety of insurance products" did not make the defendant a "consumer reporting agency" for purposes of FCRA. *Id.* As the Seventh Circuit noted, FCRA expressly excludes from the definition of a "consumer reporting agency" any "report containing information solely as to transactions or experiences between the consumer and the person making the report." *Id.* (quoting 15 U.S.C. § 1681a(d)(2)(A)(i)).

Like the healthcare network in *Tierney*, Nationwide is not the type of business FCRA is intended to regulate as a consumer reporting agency. Plaintiffs do not allege that Nationwide is a credit bureau or any facts showing that it is a consumer reporting agency. Instead, Plaintiffs clearly allege that Nationwide

collects consumers' personal information "in connection with providing insurance quotes." *See* Compl. ¶¶ 51–53, Doc. 1, PageID # 17–18. The fact that Nationwide may collect and use information about its own customers in order to provide them with insurance quotes or to ultimately underwrite and price insurance does not make Nationwide a "consumer reporting agency" under FCRA. *Tierney*, 797 F.3d at 452.

Lastly, as the Seventh Circuit pointed out in *Tierney*, numerous other courts have rejected similar attempts to apply FCRA to businesses it was not intended to regulate. *See Frederick v. Marquette National Bank*, 911 F.2d 1, 2 (7th Cir. 1990) ("[t]he statute is not even potentially applicable" because Marquette is a bank, not a "consumer reporting agency"); *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d 682, 686 (7th Cir. 2008) (defendant "is not a consumer reporting agency—it is a bank"); *DiGianni v. Stern's*, 26 F.3d 346, 348–49 (2d Cir. 1994) (the term "consumer reporting agency" did not include retail department stores that merely received and transmitted information about their customers); *Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985) (defendant Macy's "did no more than furnish information to a credit reporting agency"); *see also Garnett v. Millennium Med. Mgmt. Res., Inc.*, No. 10 C 3317, 2010 WL 5140055, at *2–3 (N.D. Ill. Dec. 9, 2010) (provider of emergency room medical services was not a "consumer reporting agency"); *Holmes v. Countrywide Fin. Corp.*, No. 5:08-CV-00205-R,

2012 WL 2873892, at *15 (W.D. Ky. July 12, 2012) ("Courts construing who or what qualifies as consumer reporting agencies have restricted the label to the credit reporting bureaus.").

Plaintiffs have not pled any facts demonstrating Nationwide is a "consumer reporting agency" and cannot rely on a threadbare allegation that merely recites the statutory definition. This Court can and should affirm dismissal of Plaintiffs' Complaints on this ground as well.

2. Plaintiffs Have Not Alleged The Existence Of A "Consumer Report."

Plaintiffs also fail to allege how their personal information constitutes a "consumer report" under FCRA. A "consumer report" is defined as a "written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness" for certain listed purposes. 15 U.S.C. § 1681a(d)(1). Plaintiffs simply fail to allege any facts demonstrating that this definition has been met. Again, the *Tierney* case illustrates this point:

> And there is no claim that Advocate shares the information so that the recipient can make a determination of credit or insurance eligibility. In other words, Advocate is not providing "consumer reports." *See id.* § 1681a(d)(1).

Tierney, 797 F.3d at 453. Plaintiffs in this case similarly do not allege that Nationwide shared any information so that the *recipient* of the information could make a determination of credit or insurance eligibility. Plaintiffs do not allege any

facts demonstrating the existence of a "consumer report," and accordingly this Court should affirm dismissal of Plaintiffs' Complaints on this ground as well.

3. Plaintiffs' Allegations Of A Willful Or Negligent FCRA Violation Are Not Sufficient To State A Claim.

Plaintiffs have also failed to allege that Nationwide's purported FCRA violations were willful or negligent. As with their other allegations, Plaintiffs have only made conclusory allegations that Nationwide acted willfully or negligently with respect to the purported FCRA violations. *See* Compl. ¶¶ 56, 63, Doc. 1, PageID # 19, 20. Such allegations amount to no more than a "formulaic recitation of the elements of [plaintiffs'] cause of action," and thus fail to satisfy Plaintiffs' pleading obligations under *Twombly*. *See Shostack v. Diller*, 2015 WL 5535808, at *10 (S.D.N.Y. Sept. 16, 2015) ("[m]erely stating that the violation was 'willful' or 'negligent' is insufficient" to allege a FCRA violation); *see also Tierney v. AdvocateHealth And Hospitals Corp.*, 797 F.3d 449 (7th Cir. 2015) (formulaic allegations insufficient to state a claim under FCRA).

Plaintiffs' novel interpretation of FCRA also undermines its allegations of a "willful" violation. As the Supreme Court has held, violation of a statute cannot be considered "willful" where "no court of appeals ha[s] spoken" to application of the statute to the circumstances in question, and where there is "no authoritative guidance" from the relevant governmental agency that administers the statute. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69–70 n.20 (2007) (involving claim of

"willful" violation under 15 U.S.C. § 1681n(a) with respect to other FCRA provisions). Plaintiffs cannot point to any Court of Appeals decision or agency guidance taking the unprecedented view that insurance companies like Nationwide are "consumer reporting agencies." This by itself precludes a determination that Nationwide engaged in a *willful* violation of FCRA.

Finally, Plaintiffs' claim for negligent violation of FCRA fails for the additional reason that Plaintiffs have failed to plead actual damages as required under the statute. *See* 15 U.S.C. § 1681o(a)(1). As already discussed with respect to standing, Plaintiffs have failed to allege any actual damages resulting from the criminal attack on Nationwide's computer network. Plaintiffs' claim for negligent violation of FCRA thus fails to state a claim for this reason as well.

B. Plaintiffs Have Not Alleged The Elements Of A Negligence Claim.

In order to state a claim for negligence, a plaintiff must allege that the defendant "(1) owed a duty of care to the plaintiff; (2) breached that duty; and (3) the breach of that duty proximately caused (4) injury to the plaintiff."[14] *Kahle v. Litton Loan Serv. LP*, 486 F. Supp. 2d 705, 708 (S.D. Ohio 2007).

[14] Federal courts sitting in diversity must apply the choice-of-law rules of the forum state. *See Tele-Save Merch. Co. v. Consumers Distrib. Co., Ltd.*, 814 F.2d 1120, 1122 (6th Cir. 1987). Under Ohio choice-of-law rules, "the law of the place of injury controls unless another jurisdiction has a more significant relationship to the lawsuit." *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286, 289 (Ohio 1984). In this litigation, according to Ohio's choice-of-law rules, the laws of three possible jurisdictions could apply: Ohio, Kansas, or Minnesota. This brief analyzes Ohio

But Plaintiffs failed to allege any facts to support these elements. Instead, as with their other claims, Plaintiffs improperly rely on conclusory and formulaic allegations in violation of *Iqbal* and *Twombly*. Furthermore, as already discussed, Plaintiffs have failed to allege any actual injury. Courts have repeatedly rejected negligence claims in the data breach context, where no actual injury has occurred.[15]

Plaintiffs' negligence claim is also barred by the economic loss doctrine. The economic loss doctrine precludes the recovery of purely economic losses in tort actions. *See Wells Fargo Bank, N.A. v. Fifth Third Bank*, No. 1:12-CV-794, 2013 WL 1064829, at *5–6 (S.D. Ohio Mar. 14, 2013) (citing *Corporex Dev. &*

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law, noting that the laws of Ohio, Kansas, and Minnesota apply the same standard with respect to negligence. *See Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995); *Honeycutt v. City of Wichita*, 251 Kan. 451, 463 (Kan. 1992).

[15] *See Kahle*, 486 F. Supp. 2d at 712–13 (plaintiff's negligence claim failed because she did not suffer a cognizable injury as a result of the theft of her personal information from a mortgage loan service provider); *Guin v. Brazos Higher Educ. Serv. Corp.*, No. Civ. 05-668 RHK/JSM, 2006 WL 288483, at *5–6 (D. Minn. Feb. 7, 2006) (plaintiff failed to establish a cognizable injury because he experienced no identity theft or other fraud as a result of the stolen information)*; In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, No. 11cv2119, 11cv2120, 11md2258 AJB (MDD), 2012 WL 4849054, at *12 (S.D. Cal. Oct. 11, 2012) ("mere 'danger of future harm, unaccompanied by present damage, will not support a negligence action.'"); *Krottner v. Starbucks Corp.*, 406 F. App'x 129, 131 (9th Cir. 2010) (plaintiffs failed to allege actual loss or damage required to state a claim for negligence under Washington law); *Ruiz v. Gap, Inc.*, 380 F. App'x 689, 691 (9th Cir. 2010) (same result under California law); *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 635, 640 (7th Cir. 2007) (same result under Indiana law); *McLoughlin v. People's United Bank, Inc.*, No. 3:08-cv-00944(VLB), 2009 WL 2843269, at *8 (D. Conn. Aug. 31, 2009) (same result under Connecticut law); *Amburgy*, 671 F. Supp. 2d at 1053, 1055 (same result under Missouri law).

Constr. Mgmt., Inc. v. Shook, Inc., 106 Ohio St.3d 412, 2005-Ohio-5409, ¶ 6 (Ohio 2005)). Plaintiffs' alleged damages for negligence consist entirely of "economic damages" associated with credit monitoring, identity theft protection, loss of privacy, and diminution of the value of their personal information. *See* Compl. ¶ 70, Doc. 1, PageID # 21–22. Courts in numerous other data breach cases have recognized that such economic losses are simply not recoverable under a negligence theory.[16] This Court should affirm dismissal of Plaintiffs' negligence claim for these reasons as well.

C. Plaintiffs Have Not Alleged The Elements Of A Claim For Bailment.

The type of relationship and transaction necessary to support a claim for bailment simply does not exist in this case. Under Ohio law,[17] bailment is defined

[16] *See, e.g.*, *In re Michaels Stores Pin Pad Litig*., No. 11 C 3350, 830 F. Supp. 2d 518, 529−31 (N.D. Ill. 2011) (economic loss doctrine barred negligence claims in data breach action under Illinois law); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig*., No. H–10–171, 2011 WL 1232352, at *21−25 (S.D. Tex. Mar. 31, 2011) (same result under New Jersey, Ohio, and Texas law); *In re TJX Cos. Retail Sec. Breach Litig*., 564 F.3d 489, 498−99 (1st Cir. 2009) (same result under Massachusetts law); *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 175−78 (3d Cir. 2008) (same result under Pennsylvania law); *Banknorth, N.A. v. BJ's Wholesale Club, Inc*., 442 F. Supp. 2d 206, 211−14 (M.D. Pa. 2006) (same result under Maine law); *Cumis Ins. Soc., Inc. v. BJ's Wholesale Club, Inc*., 918 N.E.2d 36, 46−47 (Mass. 2009) (same result under Massachusetts law).

[17] Kansas and Minnesota law apply the same legal standard for a bailment claim. *See M. Bruenger & Co., Inc. v. Dodge City Truck Stop, Inc.*, 675 P.2d 864, 866, 868 (Kan. 1984); *Colwell v. Metro. Airports Comm'n., Inc*., 386 N.W.2d 246, 247 (Minn. Ct. App. 1986).

as "the delivery of goods or personal property by one person to another in trust for a particular purpose, with a contract, express or implied, *that the property shall be returned once the purpose has been faithfully executed*." *Collins v. Click Camera & Video, Inc*., 86 Ohio App.3d 826, 830 (Ohio Ct. App. 1993) (emphasis added). Courts in data breach cases have uniformly rejected the notion that personal information provided incident to a transaction or other business relationship is or could be a bailment. *See In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 974−75; *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1127 (N.D. Cal. 2008); *Richardson v. DSW, Inc.*, No. 05 C 4599, 2005 WL 2978755, at *4 (N.D. Ill. Nov. 3, 2005). As the *Sony* court explained:

> First, as Plaintiffs freely admit, Plaintiffs' Personal Information was stolen as a result of a criminal intrusion of Sony's Network. Plaintiffs do not allege that Sony was in any way involved with the Data Breach. Rather, Plaintiffs allege that Sony failed to maintain adequate security procedures to protect against this type of theft. Thus, there are no allegations of conversion or any other intentional conduct by Sony that would indicate that Sony sought to unlawfully retain possession of Plaintiffs' Personal Information.
>
> Second, the Court is hard pressed to conceive of how Plaintiffs' Personal Information could be construed to be personal property so that Plaintiffs somehow "delivered" this property to Sony and then expected it be returned. If such a legal theory for bailment exists, Plaintiffs have failed to present the Court with such in its Opposition papers.

903 F. Supp. 2d at 974–75 (citations omitted).

Here, Plaintiffs likewise cannot allege that their personal information was "property" entrusted to Nationwide with the expectation that it would be "returned."

CONCLUSION

For the foregoing reasons, Defendant-Appellee Nationwide Mutual Insurance Company respectfully requests the Court to affirm the District Court's February 10, 2014 Opinion & Order and Judgment dismissing Plaintiffs' Complaints and its March 11, 2015 Opinion & Order denying Plaintiffs' motions for reconsideration and for leave to file an amended complaint.

Dated: October 22, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 6 Cir. R. 32, I hereby certify that this brief complies with the type-volume limitations contained in Fed. R. App. P. 32(a)(7)(B). Specifically, this brief contains 13,929 words, excluding the cover page, corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, certificate of compliance, proof of service and addenda.

s/ Michael H. Carpenter
One of the Attorneys for Defendant-Appellee Nationwide Mutual Insurance Company

PROOF OF SERVICE

This is to certify that on October 22, 2015, a true and accurate copy of the foregoing Consolidated Brief Of Defendant-Appellee Nationwide Mutual Insurance Company was uploaded to the Court's ECF system, which will serve notice and copies of the filing via electronic mail to:

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ADDENDUM A

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

Doc. #	Date	Document Title	PageID #
1	1/28/13	Class Action Complaint (*Hancox*, Case No. 13-cv-2047)	1–27
1	2/8/13	Class Action Complaint (*Galaria*, Case No. 2:13-cv-118)	1–27
21	4/19/13	Defendant Nationwide Mutual Insurance Company's Motion To Dismiss Plaintiffs' Class Action Complaints	95–136
26	5/20/13	Plaintiffs' Opposition To Defendant Nationwide Mutual Insurance Company's Motion To Dismiss Plaintiffs' Class Action Complaints	213–61
27	6/6/13	Defendant Nationwide Mutual Insurance Company's Reply Memorandum In Support Of Its Motion To Dismiss Plaintiffs' Class Action Complaints	262–89
40	2/10/14	Opinion & Order	402–32
41	2/10/14	Judgment In A Civil Case	433
42	3/10/14	Plaintiffs' Motion For Reconsideration Pursuant To Fed. R. Civ. P. 59(e)	434–36
43	3/10/14	Memorandum In Support Of Plaintiffs' Motion For Reconsideration Pursuant To Fed. R. Civ. P. 59(e)	438–46
44	3/10/14	Plaintiffs' Motion For Leave To File An Amended Consolidated Class Action Complaint	447–50
45	3/10/14	Plaintiffs' Memorandum In Support Of Their Motion For Leave To File An Amended Consolidated Class Action Complaint	451–60
45-1	3/10/14	[Proposed] First Amended Consolidated Class Action Complaint	461–86

ADDENDUM A

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS (Continued)

46	3/28/14	Defendant Nationwide Mutual Insurance Company's Memorandum In Opposition To Plaintiffs' Motion For Reconsideration	487–500
47	3/28/14	Defendant Nationwide Mutual Insurance Company's Memorandum In Opposition To Plaintiffs' Motion For Leave To Amend	501–14
48	4/11/14	Reply In Support Of Plaintiffs' Motion For Reconsideration Pursuant To Fed. R. Civ. P. 59(e)	515–23
49	4/11/14	Plaintiffs' Reply In Support Of Their Motion For Leave To File An Amended Consolidated Class Action Complaint	524–32
51	3/11/15	Opinion & Order	535–44

ADDENDUM B—REPRODUCTION OF STATUTES[18]

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STATUTES **Page**

[18] Given the length of FCRA, only key provisions discussed in the brief are reproduced in the Addendum.

15 U.S.C. § 1681

Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681a
Definitions; rules of construction

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(d) Consumer report.

(1) In general.

The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

******

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

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15 U.S.C. § 1681b

Permissible purposes of consumer reports

(a) In general

Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe--

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information--

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(G) executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that--

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to

the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of Title 42 for use to set an initial or modified child support award.

(6) To the Federal Deposit Insurance Corporation or the National Credit Union Administration as part of its preparation for its appointment or as part of its exercise of powers, as conservator, receiver, or liquidating agent for an insured depository institution or insured credit union under the Federal Deposit Insurance Act or the Federal Credit Union Act, or other applicable Federal or State law, or in connection with the resolution or liquidation of a failed or failing insured depository institution or insured credit union, as applicable.

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15 U.S.C. § 1681c

Requirements relating to information contained in consumer reports

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(d) Information required to be disclosed

(1) Title 11 information

Any consumer reporting agency that furnishes a consumer report that contains information regarding any case involving the consumer that arises under Title 11 shall include in the report an identification of the chapter of such Title 11 under which such case arises if provided by the source of the information. If any case arising or filed under Title 11 is withdrawn by the consumer before a final judgment, the consumer reporting agency shall include in the report that such case or filing was withdrawn upon receipt of documentation certifying such withdrawal.

(2) Key factor in credit score information

Any consumer reporting agency that furnishes a consumer report that contains any credit score or any other risk score or predictor on any consumer shall include in the report a clear and conspicuous statement that a key factor (as defined in section 1681g(f)(2)(B) of this title) that adversely affected such score or predictor was the number of enquiries, if such a predictor was in fact a key factor that adversely affected such score. This paragraph shall not apply to a check services company, acting as such, which issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payments, but only to the extent that such company is engaged in such activities.

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15 U.S.C. § 1681e
Compliance Procedures

(a) Identity and purposes of credit users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

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(d) Notice to users and furnishers of information

(1) Notice requirement.— A consumer reporting agency shall provide to any person—

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(B) to whom a consumer report is provided by the agency;

a notice of such person's responsibilities under this subchapter.

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15 U.S.C. § 1681f

Disclosures to governmental agencies

Notwithstanding the provisions of section 1681b of this title, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

15 U.S.C. § 1681h

Conditions and form of disclosure to consumers

(a) In general

(1) **Proper identification.**--A consumer reporting agency shall require, as a condition of making the disclosures required under section 1681g of this title, that the consumer furnish proper identification.

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15 U.S.C. § 1681k

Public record information for employment purposes

(a) In general A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall

(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

(2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

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15 U.S.C. § 1681s-2

Responsibilities of furnishers of information to consumer reporting agencies

(a) Duty of furnishers of information to provide accurate information

(1) Prohibition

(A) Reporting information with actual knowledge of errors

A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.

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15 U.S.C. § 1681v

Disclosures to governmental agencies for counterterrorism purposes

(a) Disclosure

Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish a consumer report of a consumer and all other information in a consumer's file to a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct or such investigation, activity or analysis and that includes a term that specifically identifies a consumer or account to be used as the basis for the production of such information.

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